

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own)	
motion, seeking to amend Title 291, Chapter 1,)	
Rules of Commission Procedure, to rewrite a)	Rule and Regulation No. 161
substantial portion of the rules; correct technical)	
errors, grammar, punctuation, spelling, sequential)	
numbering and the like; and reprint the chapter in)	
its entirety.)	

AT&T's COMMENTS ON THE PROPOSED RULES

Further to the Commission's Order Opening Docket and Seeking Public Comment, dated August 31, 2004, AT&T Communications of the Midwest, Inc., and TCG Omaha, Inc. (collectively "AT&T") respectfully submit the following comments on the proposed revisions to Title 291, Chapter 1, Rules of Commission Procedure.

A. Introduction.

AT&T appreciates this opportunity to provide comments on the Commission's proposed procedural rules. From the outset, AT&T notes three specific issues that deserve emphasis.

First, AT&T believes that several of these proposed rules reflect a disturbing trend toward limiting participation in the Commission's proceedings. Rather than seeking to exclude parties, limit discovery, or restrict the number or variety of viewpoints represented in the Commission's proceedings, the Commission should instead seek to be more inclusive. The Commission should welcome differing opinions and should set its rules in such a way as to encourage vigorous debate involving a wide spectrum of participants. It stands to reason that the Commission's results will be more well-reasoned, and will inure more to the benefit of the public at large, where opposing views are shared rather than suppressed—or worse, ignored.

Secondly, AT&T is concerned over the notice provisions of these proposed rules. The Commission's reliance upon first-class mail has already resulted in AT&T failing to receive timely notice of Commission action in several instances. In addition, it is absolutely vital that the Commission maintain its service lists in a strict, methodical manner. AT&T urges the Commission to re-examine not only its rules relating to notice, but also its internal practices relating to the maintenance of service lists and the distribution of notices and orders.

And thirdly, it appears that some of the proposed rules elevate form over substance. For example, the addition of new verification requirements for complaints appears entirely unnecessary. Other examples are discussed with some specificity below. Instead of installing a complicated maze of requirements—traps for the unwary—the Commission should simplify and streamline wherever possible.

B. Comments on Specific Proposed Rules.

1. The definition of contested case, found in proposed rule 001.01D, does not appear to be very useful in determining when a particular case is actually “contested,” and when it is not. AT&T therefore recommends that the following definition be used in place of the proposed rule:

001.01D Contested Case: A proceeding before the Commission in which an Initial Pleading, as set forth in Section 003.01, has actually been filed, and either a) the time for filing a responsive pleading under Section 004 has not yet elapsed, or b) a responsive pleading under Section 004 has actually been filed. A case shall remain “contested” until either a) the time for filing a responsive pleading has elapsed without any such pleading having been filed, or b) a written decision on the merits has been issued by the Commission.

2. The definition of ex parte communication, found in proposed rule 001.01F, should be made more specific. AT&T recommends that it be revised to read as follows:

001.01F Ex Parte Communication: An oral or written communication, regardless of the medium, made by or on behalf of a party to a contested case, to a commissioner, hearing officer, or other agency decision maker in that contested case ~~any medium~~, which communication a) relates to the facts, issues, testimony, argument, scheduling, merits, rulings, or outcome of the contested case, b) is not made on the record in a the contested case, and c) with respect to which reasonable advance notice to all parties was not given. Ex parte communication does not include:

001.01F1 Communications that ~~do not~~ pertain to the procedural aspects ~~merits~~ of a contested case;

001.01F2 Communications in a rulemaking proceeding; and

001.01F3 Communications to which all parties have given consent, having been fully informed of all the circumstances surrounding and content of those communications.

3. The definition of “person” should be all encompassing without being redundant. Therefore AT&T recommends that the current definition be amended to read as follows:

001.01N Person: The term “person” shall be broadly construed to include any An individual, firm, organization, corporation, company, unincorporated association, partnership, joint stock association, limited liability company, governmental agency or political subdivision (including the Public Advocate), body politic, common or contract carrier, or other entity recognized by the laws of the State of Nebraska. society, legal representative, trustee, receiver, assignee, guardian, executor or administrator.

Legal representatives, trustees, receivers, assignees, guardians, executors, and administrators are all “individuals,” and therefore fall into the definition of “person” without further elaboration.

4. The types of proceedings listed in proposed rule 003 appear to be incomplete.

AT&T recommends that the Commission consider taking action on the following additional types of initial pleadings: a) an application for withdrawal of authority; b) a petition for rulemaking, filed by a party other than the Commission; and c) an application or petition for an order to show cause, filed by a party other than the Commission.

In addition, it should be noted that, although the Commission rules define a “motion” in Section 001.01L, a motion is not included as one of the pleadings accepted in Sections 003, 004, or 005. This is a shortcoming that should be corrected by adding a new Section 003.03, as follows: “Motions. Motion practice before the Commission is governed by Section 019 of these rules.”

5. It appears that the syntax in proposed rule 003.02 could be improved. AT&T recommends the following revisions:

003.02 Informal Complaints: The Commission may investigate informal complaints using appropriate means ~~on an informal basis~~ to resolve questions, disputes, develop further information, or otherwise resolve an issue.

6. The list of responsive pleadings allowed under proposed rule 004 appears to be incomplete. AT&T recommends that the Commission consider taking action on the following additional types of responsive pleadings: a) an objection or objections to a motion; b) a motion to dismiss a formal complaint or petition; and c) a motion for more definite statement, in response to a departmental or formal complaint.

Under proposed rule 005.08, the Commission may dismiss a formal complaint, but the current version of the rules does not appear to allow the filing of a motion to dismiss. It would seem only appropriate that such an action be expressly allowed.

7. AT&T believes that the new requirement of a verified signature for applications (in Section 005.02), formal complaints (Section 005.05), and petitions (Section 005.06) is entirely unnecessary, especially in light of the fact that, in accordance with Section 006, the signature of counsel “constitutes a certificate by him/her that he/she has read the pleading; that to the best of his/her knowledge, information and belief there is good grounds to support it; and that it is not interposed for delay.”

If there has been a problem with the veracity of material found in applications, formal complaints, and petitions, AT&T is unaware of it. Therefore, the added requirement of verification appears to be unnecessary and should be stricken. Moreover, if the allegations contained in a formal complaint (for example) must be verified, then why shouldn't the answer to a verified formal complaint be verified as well? (And so on, and so on...) AT&T believes that such a requirement is unduly burdensome on all parties, and merely provides a pitfall for persons with otherwise legitimate grievances. For example, will the Commission automatically reject a formal complaint on the technicality that it has not been “verified?” While there may be some companies that would cheer at such an action, the people of Nebraska deserve better treatment than that. In short, this is a proposal that seeks to elevate form over substance, and should simply be rejected.

8. There is something of a logical inconsistency in the time allowed to answer a complaint in Sections 005.08B and 005.08C. By filing a “statement of satisfaction”¹ within 10 days, a company does not have to answer a complaint for a total of up to 30

¹ AT&T respectfully suggests that a “statement of satisfaction” is a misnomer. Perhaps a better title would be “proposal for satisfaction.” This would more accurately reflect the settlement posture that exists between the parties, instead of a “take it or leave it” stance inherent in the current title.

days. By failing to file such a statement, the company must answer the complaint in 15 days. So, even if the statement of satisfaction is completely unacceptable and lacks any sincere effort to arrive at a resolution, the company (by filing such a statement) will have successfully delayed the proceedings by more than two weeks, and no doubt added to the frustration of the complaining party.

The question, initially, must be asked as to why a company that has ostensibly investigated the complaint and prepared and filed a statement of satisfaction then needs more time to answer the complaint than a company that has not? The second question that must be asked here is whether the resulting two-week delay is genuinely serving the public interest?

AT&T respectfully suggests that the solution here is to reverse the timeframes provided in Sections 005.08B and 005.08C. In other words, AT&T recommends that the time allowed to respond to a complaint under Section 005.08B should be extended from 15 days to 20 days, and the time allowed to respond to a complaint under Section 005.08C should be shortened from 20 days to 15.

9. Proposed rule 006 would add the phrase “who is qualified under this chapter,” to modify the term “attorney of record.” However, the addition of this language does not appear, on its face, to add any clarification to the rule, nor does it appear calculated to improve the quality, efficiency, thoroughness, or speed of proceedings before the Commission. Indeed, AT&T believes that the addition of this phrase will bring unnecessary confusion to the otherwise simple act of signing a pleading. For example, are the qualifications of an attorney subject to question each and every time he or she signs a pleading? Or should it be enough that the attorney is “of record” in the case? Has

there been a problem with “unqualified” attorneys signing pleadings before the Commission? If so, AT&T is unaware of that problem. In addition, the question must be asked, “What are the qualifications of this chapter?” It appears that the qualifications for an attorney under this chapter are found exclusively at proposed rule 002.02.

(“...admitted to practice law before the Nebraska Supreme Court or is admitted to practice law before the Supreme Court of any other state is has been admitted to practice before the Commission in a proceeding upon a motion...”)

If these are the only “qualifications” under this chapter, then AT&T recommends that proposed rule 006 be modified to recognize that fact. Instead of saying, “who is qualified under this chapter,” the rule should be more specific and state, “who is qualified under Section 002.02” or similar language.

Preferably, however, the proposed phrase “who is qualified under this chapter” should simply be deleted.

10. Proposed rules 011.02 and 011.05 would introduce service by first-class mail to the current list of methods available to the Commission for service of process. AT&T views the use of first-class mail in this manner to be a step backward. Most companies, and certainly most law firms, rely heavily upon e-mail for the delivery of and response to important messages. In many respects, the proposed rule 011.02 fails to take this current reality into account. AT&T believes that the promulgation of this rule would therefore be a mistake. While it may be possible to address some of the difficulties inherent in this approach, it would be preferable to work within the framework of existing and developing technology rather than relying upon an older—some might say outmoded—means of communication.

In the event the Commission insists upon the use of first-class mail for service of process, AT&T recommends that two further precautions be taken to ensure delivery, and comply with due process. First, each time first-class mail is used for service, it should at least be supplemented with electronic delivery. And secondly, wherever first-class mail is used for service of process, additional response time for the recipient must be provided in view of the substantial lag between mailing and receipt of the pleading, motion, or other document. This lag can in some instances exceed three business days. AT&T recommends that the Commission's rules expressly state that when service is achieved by way of first-class mail, the response time for any document is automatically extended for five business days.

However, again, it would be preferable for the Commission to utilize newer technology to the greatest extent possible. AT&T believes that maintenance and use of an electronic service list is crucial to the efficient provision of notice by the Commission. AT&T would also note that the use of electronic service does not excuse or otherwise allow the use of abbreviated time frames for response. In other words, there are certain minimum considerations in establishing whether due process requirements are being met, and these are not affected by the mode of service that is employed. For example, delivery of a pleading within a day or two of the response time for that pleading is unacceptable, regardless of the method of service used. The use of an electronic service list should accrue to the benefit of all parties; it should not be used as an excuse to place additional stress or strain upon a respondent.

AT&T recognizes that the establishment and maintenance of electronic service lists presents a variety of distinct challenges to the Commission and its Staff. AT&T

respectfully requests that the Commission thoroughly review its own practices and procedures in order to ensure that parties are provided adequate, timely notice.

11. Proposed rule 012.03 appears to give the Commission only three choices in crafting an order after investigation. It may order that the person subject to the investigation cease and desist, or assess a civil fine or penalty, or “enter any order justified in the premises.” AT&T respectfully submits that the syntax of this sentence would be more clear if it were phrased as follows:

If it shall appear, as the result of an investigative hearing by the Commission, that any person has violated the provisions of any statute over which the Commission has jurisdiction, the rules of the Commission, or a Commission order, the Commission may enter any order justified in the premises, including an order to cease and desist, an order assessing a civil penalty, a combination of the two, or some other order calculated to remedy and eliminate the violation.

The same approach could be taken with respect to proposed rule 013.03.

12. The new, additional language in proposed rule 014.01 does not make grammatical sense. AT&T believes this can be corrected as follows: “...except to the extent that informal intervention or public comment may be allowed as provided in this chapter.”

Perhaps more importantly, however, this rule—without any apparent reason or justification—creates a three-tiered hierarchy of participants in a case. At the top of the hierarchical pyramid are “protestants,” who have filed a protest in accordance with proposed rule 014. Somewhere below them on the pyramid are “formal intervenors,” who have filed a Petition of Formal Intervention under rule 015.01. Then at the bottom of the pyramid are “informal intervenors” under rule 015.02.

The difference in status between a “protestant” and a “formal intervenor” is difficult to ascertain, but it is there nonetheless. As expressed in rule 014.01, the failure to file a protest shall be construed as a waiver of opposition and participation in the proceeding, “[e]xcept as provided in Section 015.” So, at least on the face of things, it would appear that a protestant’s rights are not limited by Section 015, but a formal intervenor’s rights are. However, the full extent of this difference is unclear.

One potential difference is found in proposed rule 015.01D (“Participation in Proceedings”). In this instance, the proposed rule would allow the Commission to limit the participation of formal intervenors, with respect to the issues upon which the formal intervenor may argue or opine, the use of discovery and cross-examination, and requiring two or more intervenors to combine their presentations. It does not appear, however, that these same limitations would apply to a “protestant.”

AT&T respectfully submits that it makes no sense to distinguish between a “protestant” and a “formal intervenor,” either expressly or by implication. AT&T therefore recommends deletion of the following sentence from proposed rule 014.01:

~~Except as provided in Section 015, failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding, except to the extent that informal intervention or public [comment] may be allowed as provided in this chapter.~~

AT&T has further comments on the proposed rules’ treatment of both formal intervenors and informal intervenors. Please see sections 15, 16, and 17 of these comments, below.

13. The proposed requirement in rules 014.02 and 014.06, that the protestant serve copies of its protest upon all parties of record, does not take into account the

practical aspects of filing a protest. Depending upon when a protest is filed, there may not be any additional parties of record, other than the applicant. AT&T suggests that the role of the Commission here should be to gather all filed protests, and at the end of the thirty (30) day period distribute copies to all protesting parties. Thus, a protesting party would be required only to file his or her protest with the Commission, and serve a copy upon the applicant.

14. The reliance upon facsimile and electronic delivery of pleadings in proposed rules 014.05 and 014.06 is a vast improvement over the approach taken in proposed rule 011.02. The important thing in any rule relating to service of process is that the document be delivered in a timely and efficient manner. Proposed rules 014.05 and 014.06 accomplish this, using some of the best available, current technology.

15. AT&T believes that formal intervenor status should be routinely granted as a matter of right to any party who seeks it. AT&T therefore believes that the deletion of language in proposed rule 015.01, and the addition of a new section, 015.01C, is inappropriate, and is likely to result in the unfair curtailing of parties' rights by the Commission. The new language in proposed rule 015.01C would require that a party justify its participation in a proceeding even before the proceeding is under way. So the initial question is what kind of representation or showing will be adequate to "demonstrate" the party's interest in the proceedings? Secondly, what standard will the Commission use to determine whether a party has indeed demonstrated that its rights will be affected by the proceedings? Third, can the Commission truly justify excluding a party because its rights or duties will not be "substantially" affected by the proceedings? Shouldn't a party be allowed to participate if its legal interests will be affected at all?

And who is the best judge of whether a party's rights will be affected, or to what degree? Is that the Commission, or is it the party itself? Fourth, if a party has been excluded from proceedings, who will then ensure that the Commission does not, thereafter, take action that in fact does "substantially" affect that party's legal interests? Will the Commission then guarantee that it will take no action to adversely affect the rights of that excluded party?

If the Commission is interested in fundamental fairness, it should not be promulgating rules designed to exclude parties from its proceedings, or limit their ability to participate. On the contrary, it should be seeking participation from a wide variety of parties, representing a wide variety of different viewpoints and perspectives.

For the Commission to act as gatekeeper for participation in different proceedings is a slippery slope. AT&T recommends that the Commission take a more expansive approach here, rather than a more exclusionary one.

16. The same disturbing trend to which AT&T objects in proposed rule 015.01C is also found in proposed rule 015.01D ("Participation in Proceedings"). In this instance, the proposed rule would allow the Commission to limit the participation of formal intervenors, with respect to the issues upon which the formal intervenor may argue or opine, the use of discovery and cross-examination, and requiring two or more intervenors to combine their presentations.

AT&T believes that it should not be up to the Commission to limit participation by a party to specific issues. This approach presumes on the one hand that specific issues may be culled out in advance, and that is not usually the case. In addition, this approach presumes that a person must somehow "demonstrate" his or her interest in advance of any

discussion of the issue. Very frequently that is simply not possible. In addition, as stated previously, AT&T believes that the best judge of whether a party's interests are affected by a proceeding is the party himself or herself. Proposed rule 015.01D1 should therefore be deleted.

In addition, limiting the ability of a party to engage in discovery and cross-examination presumes that the amount of necessary discovery may be predicted in advance. This is almost never the case. Moreover, the language of these proposed rules makes it much easier for a party receiving discovery (or who is subject to cross-examination) to stone-wall and block progress when it comes time to answer that discovery, or cross-examination. The Commission should be interested in hearing views and receiving information from a wide variety of viewpoints. Proposed rule 015.01D2 sends a clear message that the Commission does not want to hear from certain parties, and that it does not always want to be bothered with discovering the facts underlying a particular case. Proposed rule 015.01D2 should therefore be deleted.

The proposed requirement that some intervenors combine their presentations is also extremely presumptuous. It assumes that the Commission can force two parties to cooperate when their interests may not be entirely parallel. It also denigrates the stature of "some" parties over others, meaning that whatever is presented jointly will not have the same standing or status as the material presented singly by one party. To speak bluntly, the message delivered by this proposed rule is "Don't bother us with the facts, we're not interested, we don't have time." AT&T believes that this Commission does not want to send that message, and therefore recommends that proposed rule 015.01D3 be deleted.

In fact, AT&T recommends that the changes offered in proposed rule 015.01D be deleted in their entirety.

17. Proposed rule 015.02 would also eliminate the ability of parties to obtain informal intervenor status as a matter of right. AT&T finds this proposed rule change disturbing as well, for the same reasons as have been expressed above in sections 15 and 16 of these Comments. AT&T believes that informal intervenor status should be granted as a matter of right.

In addition, by deleting the last sentence of rule 015.02 (“Any person who shall file a Petition of Informal Intervention shall be designated as an ‘informal intervenor.’”), the proposed rule calls into question the status of informal intervenors. In fact, it appears that informal intervenors have absolutely no status whatsoever under the proposed rules. They are not a “party,” and therefore they seem to have no rights at all.

If this is an intended result, then two points must be addressed. First, the Commission has not provided any justification for stripping informal intervenors of their rights here. Certainly the public interest does not appear to be served by this approach. And secondly, the proposed rules lack clarity with regard to the elimination of informal intervenor rights. Simply stated, the Commission should be much more explicit in its elimination of rights for informal intervenors, if that is what it intends to do. As it stands, the proposed rules tend to obscure the issue of what rights an informal intervenor actually has, and provide more questions than they do answers. If the Commission intends to create a subset of “non-participating participants,” then it would appear appropriate to state explicitly what rights informal intervenors do *not* have.

On the other hand, as stated previously here, AT&T believes that it is much more appropriate for the Commission to invite participation, and to be expansive in its procedures, rather than seeking to limit participation. Therefore AT&T respectfully suggests that the proposed changes to rule 015.02 be deleted.

The one exception to this is the addition of the word “and” in proposed rule 015.02C. That is clearly intended to correct an existing typographical error in the rules, and should be implemented.

18. The prohibition against ex parte communication found in proposed rule 016.02 has numerous flaws in it. For example, it would apparently allow the Public Advocate, exclusively, to engage in ex parte communication with the Commission. Also, the prohibition language does not appear to have been coordinated closely with the definition of ex parte communication proposed in rule 001.01F. In addition, as stated previously in section 1 of these comments, there is no real definition for, or guidance in determining, what is a “contested case.”

For simplicity’s sake, and to remedy the flaws contained in the existing language, AT&T recommends first that proposed rule 016.02 be amended to read as follows:

016.02 Prohibition Against Ex Parte Communications: A member, staff, or agent of the Commission shall not engage in ex parte communications relating to a contested case.

The definition of ex parte communication proposed in rule 001.01F will then be used to establish what constitutes an improper communication. And the definition of “contested case” proposed above will provide guidance as to when the ex parte rules apply.

19. With regard to the treatment of confidential or trade secret information, AT&T would suggest that the following language be added after the last sentence of proposed rule 018.13A3:

If the motion is denied, the Commission shall, for a period of no less than ten (10) business days, maintain the confidential status of the submitted information, and, at the option of the owner of the information, promptly require the return that information to the owner, together with all copies, duplicates, or replicas.

In addition, the following language should be added after the last sentence of proposed rule 018.14:

Except as provided herein, the Commission shall withhold such information from disclosure to other parties. Any request for disclosure of such information shall be in writing and shall state with specificity the grounds and legal authority supporting the request. The Commission shall promptly forward a copy of the request to the owner of the information, who shall have ten (10) business days from its own receipt of the request to reply to the Commission. Upon receipt of the owner's reply the Commission shall set the matter for hearing. At the conclusion of the hearing, the Commission shall issue a written decision on the request. If the request is granted, the Commission shall, for a period of no less than ten (10) business days, maintain the confidential status of the information, in order to allow the owner to appeal that decision to the appropriate court.

20. With respect to the handling of complaints and investigations, AT&T believes that it is very frequently appropriate to allow surrebuttal and reply. AT&T would urge the Commission to include that procedure within the text of proposed rules 018.15B and 018.15C.

21. With respect to motions practice before the Commission, AT&T would note two things. First, the use of first-class mail to serve motions does not allow adequate time for response. Consistent with AT&T's previous comments here (in sections 10 and 14, *supra*), AT&T recommends that all filed motions be served upon the parties using

supplemental electronic service. In addition, the time for response should, at a minimum, be extended by five (5) business days.

Secondly in this regard, AT&T has noticed that the Commission does not always adhere to the principle that the moving party should have the last word with respect to a motion. AT&T respectfully asks that the Commission be more mindful of this principle when listening to argument, and receiving objections.

22. Throughout proposed rule 020.09, AT&T recommends that the phrase “hard of hearing” be replaced with the phrase “hearing impaired.”

23. There appears to be a subscript capital “G” at the end of the heading for proposed rule 022.01I, that does not belong there.

24. AT&T believes that, in all cases involving complaints, the Commission should act in the capacity of an impartial decision maker. However, the provisions of proposed rule 029.03B would allow the Commission to intervene either for or against a specific complaint, without having first heard the matter. This in turn does not appear fair or impartial. AT&T therefore recommends that proposed rule 029.03B be deleted in its entirety.

25. With respect to proposed rule 029.03D, AT&T would reiterate its concerns over the use of first class mail for service of process, and would ask that such service, in all cases, be supplemented electronically.

C. Conclusion.

These procedural rules essentially establish the manner in which the Commission will deal with carriers and the public. In many ways, these rules form the very

foundation of the relationship between and among the Commission, the entities it regulates, and the public at large. In that context, AT&T would note three concerns, or themes, that resonate throughout these comments. First, the Commission should be more inclusive and less exclusive. Second, timely notice of Commission action and the maintenance of quality service lists are both vital. And third, the rules should not elevate form over substance; they should be streamlined wherever possible.

AT&T requests that the Commission adopt the editorial changes recommended here.

Respectfully submitted this 15th day of October, 2004.

**AT&T COMMUNICATIONS OF THE
MIDWEST, INC. AND TCG OMAHA, INC.**

By: _____

Loel P. Brooks, #15352
BROOKS, PANSING BROOKS, P.C., LLO
984 Wells Fargo Center
1248 "O" Street
Lincoln, Nebraska 68508-1424
Telephone: (402) 476-3300
Fax: (402) 476-6368
E-Mail: lbrooks@brookspanlaw.com

Gary B. Witt
AT&T Law Department
1875 Lawrence St., Suite 1575
Denver, CO 80202
Telephone: (303) 298-6163
Fax: (303) 298-6301
E-Mail: gwitt@att.com